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No. 216

# In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSEPH CURCIO AND GEORGE BAKER, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. 1a-3a) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1960 (Pet. 1a). The petition for a writ of certiorari was filed on July 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the trial court's questioning of the witnesses deprived petitioners of a fair trial.

2. Whether the trial court committed reversible error in giving the jury a supplemental charge—

after it indicated it was unable to agree on one count of the indictment—in language taken from *Allen* v. *United States*, 164 U.S. 492, 501.

3. Whether there was sufficient evidence to support the jury's verdict of guilty on the conspiracy count.

## STATUTES INVOLVED

18 U.S.C.:

> SEC. 371. *Conspiracy to commit offense or to defraud United States.*
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.
>
> SEC. 1001. *Statements or entries generally.*
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more $10,000 or imprisoned not more than five years, or both.

SEC. 1503. *Influencing or injuring officer, juror or witness generally.*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

## STATEMENT

On September 24, 1957, petitioners were indicted in the United States District Court for the Southern District of New York for having wilfully made false and fraudulent statements in a matter within the jurisdiction of the Internal Revenue Service (counts 1–3), in violation of 18 U.S.C. 1001, and for conspiring to influence, obstruct and impede the due administration of justice in the United States District Court for the Southern District of New York, in violation of 18 U.S.C. 1503 (count 4) (R. 1a, 5a–12a).

After a jury trial petitioners were found guilty as charged (R. 449a). They were sentenced to a two-year prison term on the conspiracy count. Imposition of sentence on the false-statement counts was suspended and petitioners were placed on probation for three years, during which they were enjoined from serving as officers or employees of any labor organization or as labor relations consultants (R. 451a, 454a).

The evidence to support the verdict may be summarized as follows:

1. *The false statement counts.* In May, 1954, one John Dioguardi was president of Local 649 of the United Automobile Workers of America, in New York City. Petitioner Cureio was secretary-treasurer; petitioner Baker was trustee and business agent and administered the Local's welfare fund. Cureio and Baker hired as bookkeeper a Mrs. Warshauer, who had had 28 years experience in that field (R. 62a–63a). Mrs. Warshauer at once began to reconstruct the books, which had been very poorly kept. Within

a few weeks Mrs. Warshauer had set up a new set of books for the local reflecting transactions from 1952 to date (June, 1954), which included a general ledger, cash receipts and cash disbursements books, payroll book, petty cash vouchers and a union ledger; and a similarly complete set of books for the welfare fund for the period January, 1953, to date. The new books were kept in a combination safe at the office (R. 66a-68a). In September, 1954, Curcio succeeded Dioguardi as president (R. 63a).

Late in December, 1954, Mrs. Warshauer opened the office one morning and discovered that it had been broken into during the night and "was in a general mess" (R. 68a). She closed the office at once and notified the police, who returned with her. Mrs. Warshauer then searched the office and was able to find all of the books and records of Local 649 and of the welfare fund. She informed the police that nothing was missing and a police report was made to the effect that no property had been taken (R. 68a-69a, 97a-98a). Mrs. Warshauer notified Curcio at once that nothing was missing, and so advised Baker—who was out of town—by telephone about a week later (R. 70a).

A few days later the local moved to offices on Broadway. On that occasion both Curcio and Baker again asked Mrs. Warshauer whether any books or records were missing, and she again replied in the negative (R. 70a-71a). Under Curcio's supervision, the books and records were packed and moved to the new offices (R. 72a). Shortly after their arrival there, Curcio had the books and records for 1954 and

prior years placed in a transfer case; subsequently they were removed to a location unknown to Mrs. Warshauer (R. 72a–73a).

On September 21, 1955, Baker and Curcio executed notarized affidavits, later filed with information returns for the union for 1954, stating that similar returns for prior years could not be filed "as the necessary records were destroyed during a robbery of the union offices in December 1954" (18a, 19a). Counts 1 and 2, charging false statements by Curcio and Baker, respectively, were based on those affidavits.

In November 1955, a Treasury agent investigating the 1948–1952 income tax liability of Dioguardi, the former president of the Local, was told by Curcio that the Local's records had been destroyed in a 1954 robbery. Upon further inquiry from the agent, Curcio signed and gave to the agent a letter, prepared by the union's accountant, Finkelstein, listing the records then available and stating: "We are unable to locate any other records prior to the date set forth above. Such records may have been lost in a robbery which took place December 23, 1954" (R. 28a–30a). Count 3, charging a false statement by Curcio, was based on that letter.

2. *The conspiracy count.* On March 29, 1956, a Special Grand Jury was empaneled in the Southern District of New York to investigate alleged racketeering in certain industries, including the activities of John Dioguardi as president of Local 649 from 1952 to September, 1954. Curcio read about the investigation in the newspaper (R. 8a–9a, 180a).

In April 1956, Curcio instructed Mrs. Warshauer to establish a new set of books for the Local, commencing with April transactions, and the old set of books was removed from the office (R. 79a–85a). The union's fiscal year did not end until May 31, and there was ample space in the old books for further entries (R. 84a–85a). Mrs. Warshauer was told by Curcio that "because of the investigations, there was no point in having these books present in the office" (R. 80a) and, by Baker, "that too many people were snooping around; there was no point in having these records around for people to look at them" (R. 82a).

In November 1956, the grand jury served subpoenas *duces tecum* on both petitioners, calling for production of the books and records of the union and the welfare fund from 1950 to date. Mrs. Warshauer assembled the books still in the office—*i.e.*, the current books beginning in April 1956—and left them at the office with petitioners and Finkelstein on the day before the return date (R. 95a–96a, 160a).

None of the subpoenaed books or records was produced before the grand jury on the return day, whereupon petitioners were subpoenaed to explain the nonproduction. Curcio testified in substance as follows: In April 1956 all the records up to that time had been taken to Finkelstein's office. There was "[n]o particular reason" for setting up new books (R. 184a) except that he felt the old books would be "safer" there (R. 180a, 185a). On the day before the return day, he and Baker packed the current books remaining in the union office in cartons and placed them in the rear seat of Baker's car for delivery to the grand

jury the next morning (R. 179a, 195a–197a, 200a–203a). Finkelstein was to have the records in his possession also delivered to Baker (R. 194a). Early the next morning Baker telephoned Curcio and told him that he had received the records from Finkelstein and placed them in the car with the others; that he had parked the car overnight on a midtown street; and that the car had been broken into and all the records stolen (R. 194a–195a). Curcio further testified that some records had been discovered to be missing in 1955 when Finkelstein tried to prepare some financial statements (R. 208a–209a); that he had never given records to anyone other than Finkelstein (R. 189a–190a); and that he did not know what happened to the missing records unless they were stolen or destroyed during the December 1954 robbery (R. 216a). Although he had asked Mrs. Warshauer to see if anything was missing after the robbery, he could not remember whether she had told him of any missing books, though he didn't think she had (R. 211a–218a).

Petitioner Baker told the grand jury that after he left Curcio on the day the records were placed in the car he met a man from the accountant's office who gave him additional records, which he also placed in the car; that he parked his car on a midtown street and when he returned the next morning he found that one of the windows had been broken and all of the records were missing (R. 230a–231a, 238a–244a). Baker further testified that both Mrs. Warshauer and Curcio had told him certain records had been missing after the robbery in 1954 (R. 251a).

ARGUMENT

1. Petitioners' principal contention (Pet. 12–24, 26–33) is that the trial court questioned the witnesses excessively and in such a manner as to exhibit partiality toward the Government and hostility to Finkelstein, the only defense witness, thus depriving petitioners of a fair trial. It is true that the judge asked many questions, both on direct and cross-examination, but the record, examined as a whole, does not bear out the charge that he showed partiality. A federal trial judge has the power and the duty to act in the interrogation of witnesses and otherwise to the end that trials will not be mere contests in forensic skill by the opposing attorneys, but that the truth shall emerge so far as possible. *Glasser* v. *United States*, 315 U.S. 60, 82; *United States* v. *Aaron*, 190 F. 2d 144, 146 (C.A. 2d), certiorari denied *sub nom. Freidas* v. *United States*, 342 U.S. 827; cf. *Quercia* v. *United States*, 289 U.S. 466. Indeed, the judge may even express his opinion upon the weight of the evidence and the credibility of witnesses, so long as he makes it clear that the jury is in no way bound by such observations. *United States* v. *Aaron*, supra, pp. 146–147; *Kettenbach* v. *United States*, 202 Fed. 377, 385 (C.A. 9th). Of course a judge, both in his comments and in the questions he puts to witnesses, must maintain impartiality and a courtroom atmosphere in which guilt or innocence may be fairly tested. But the asking of a large number of questions by the trial court, even where it is apparently unnecessary, is not error *per se*. *United States* v. *Aaron*, *supra*, p. 146; *Daley* v. *United States*, 231 F. 2d 123,

129 (C.A. 1st); *United States* v. *DeFillo*, 257 F. 2d 835, 839 (C.A. 2d), certiorari denied, 359 U.S. 915. It is the nature, not the extent, of the judge's participation that is decisive. One grossly unfair comment by him may be sufficient to call for reversal, *Quercia* v. *United States*, 289 U.S. 466, while many questions put by him to witnesses may be innocuous, *United States* v. *Switzer*, 252 F. 2d 139, 144 (C.A. 2d).

To determine whether the court's active participation in the trial affected petitioners' substantial rights it is necessary to examine the record as a whole. *Glasser* v. *United States*, *supra*, pp. 82–83; *United States* v. *Switzer*, *supra*, p. 144. The court of appeals did so and concluded that petitioners were not deprived of a fair trial, pointing out that the trial judge "constantly admonished the jury of their final responsibility and did this again explicitly in the course of a fair charge." * (Pet. 3a) The record

* In its charge to the jury the court stated (R. 430a–431a):

> During the trial I addressed questions to some of the witnesses and on occasion made statements addressed to counsel. Such questions as were asked by me were for the purpose only and solely of eliciting facts to aid you in your deliberations. If any of you have formed any impression that I accentuated certain facts or that I have any view at all as to the guilt or innocence of the defendants you must put that completely out of your mind, because the responsibility is yours and yours only to evaluate the testimony and determine the guilt or innocence.
>
> I have sought to avoid any comment which might suggest my personal views on the weight of the evidence, the credibility of the witnesses, the inferences to be drawn, or the importance of one phase or segment of the testimony as compared to another, and no comment

bears out that conclusion and no further review is required.

2. After having deliberated for some five hours, the jury sent the court the following note (R. 446a):

> Your Honor, jury agreed on first three counts. Cannot reach agreement on Count No. 4, with little chance of doing so. Request further instructions from Court.

The court thereupon charged the jury in the language of *Allen* v. *United States*, 164 U.S. 492, 501, a charge now attacked (Pet. 24–26, 34) as prejudicial. No objection was raised in the district court, and in any event the charge was a proper one. *Anderson* v. *United States*, 262 F. 2d 764 (C.A. 8th), certiorari denied, 360 U.S. 929; *Dwyer* v. *United States*, 17 F. 2d 696 (C.A. 2d), certiorari denied, 274 U.S. 756; *United States* v. *Samuel Dankel & Co.*, 173 F. 2d 506, 509 (C.A. 2d); *Wright* v. *United States*, 175 F. 2d 384 (C.A. 8th), certiorari denied, 338 U.S. 873. In the case relied upon by petitioners (Pet. 34), *Stewart* v. *United States*, 300 Fed. 769 (C.A. 8th), the trial judge asked the jury, after a day of fruitless deliberation, whether they were evenly divided or whether there was a preponderance one way or the other. That same court has repeatedly upheld the

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made by me was intended to communicate to you or suggest my personal views. You are not to assume that I have any views as to the guilt or innocence of the defendants. I repeat, that question is your sole and exclusive responsibility.

The same sort of admonition was repeated by the court at various times during the trial: *e.g.*, R. 57a–58a, 106a, 150a, 315a, 351a, 370a.

*Allen* charge provided no inquiry is made as to how the jury stands. *Anderson* v. *United States*, *supra*; *Wegman* v. *United States*, 272 F. 2d 31 (C.A. 8th); *Wright* v. *United States*, *supra*.

3. Equally without merit is the contention (Pet. 34–37) that the evidence on the conspiracy count was insufficient to support the verdict. There was, to be sure, no direct evidence of a conspiratorial agreement, but the circumstantial proof was ample. Petitioners, as the principal union officials after John Dioguardi's departure in 1954, were directly concerned with the grand jury investigation. The special grand jury was empaneled on March 29, 1956, and began to inquire into the activities of Dioguardi at the time he was president of Local 649 from 1952 to 1954. Only a few days later, early in April, 1956—in the middle of the union's fiscal year—Curcio instructed Mrs. Warshauer to prepare a new set of books and records; Baker told her that he, too, felt a new set was necessary, although the existing books contained ample pages for further entries. Curcio turned over to his accountant all of the Local's old records for "safekeeping", and the accountant later told a Government official that he "got the inference from Curcio that the purpose of putting the books in my office was to get the books out of his possession so that he would not comply with the subpoena should one be served" (R. 357a-358a). None of the subpoenaed books and records was produced by either petitioner; and both testified before the grand jury that some of the records were missing after the robbery late in 1954, although in fact Mrs. Warshauer had informed them

repeatedly that nothing was missing. In the light of the past history of concealment of the books—the false claim that books were stolen in December 1954; the removal of some of the books in a transfer case shortly thereafter to an unknown place; the setting up of new books in the middle of the fiscal year in April 1956, just after the grand jury was empaneled; and the removal of the old books to the accountant's office with direct evidence of a purpose of concealment—the jury need not have accepted the incredible tale that the books, conveniently gathered together and left in plain view on the rear seat of a car parked overnight on a midtown street, just "happened" to have been stolen on the eve of their production before the grand jury. The jury was rather entitled to conclude that the eleventh-hour "theft" of the books was but another stratagem devised by petitioners in a final desperate attempt to prevent their examination by the grand jury.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1960.